IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1184 OF 2004

Ganesh Navalsingh Thapa ...Petitioner

Vs.

1. The Commissioner of Police,
   Greater Mumbai.
2. The State of Maharashtra
3. The Superintendent,
   Thane Central Prison,Thane
4. The Superintendent,
   Nasik Road Central Prison
   Nasik. ...Respondents

ALONGWITH
CRIMINAL WRIT PETITION NO.1185 OF 2004

Ashok Narayan Jiwani ...Petitioner

Vs.

1. The Commissioner of Police,
   Greater Mumbai.
2. The State of Maharashtra
3. The Superintendent,
   Thane Central Prison,Thane
4. The Superintendent,
   Nasik Road Central Prison
   Nasik. ...Respondents

ALONG WITH
CRIMINAL WRIT PETITION NO.1186 OF 2004

Ashokkumar Thewar @ Kittu @ Hussein ...Petitioner

Vs.

1. The Commissioner of Police,
   Greater Mumbai,Mumbai
2. The State of Maharashtra
3. The Superintendent,
   Thane Central Prison,Thane
4. The Superintendent, Nasik Road
   Central Prison, Nasik ...Respondents

Shri Nitin Sejpal for the Petitioners
Shri Mhaispurkar,A.P.P for the Respondents.

CORAM: SMT.RANJANA DESAI & A.S.OKA,JJ.

DATE OF HEARING OF LAST ARGUMENTS: OCTOBER 15,2004.

DATE OF PRONOUNCEMENT OF JUDGMENT: 5TH NOVEMBER 2004.

ORAL JUDGMENT:**(Per A.S.OKA,J.)**

1. These three Petitions can be disposed of by a common Judgment as facts involved in all the three Petitions are more or less identical.

2. In all these Writ Petitions, the Petitioners are detenues against whom the orders have been passed for detention under Section 3(2) of Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders and Dangerous Persons Act, 1981 (hereinafter referred to as the said Act of 1981). The orders of detention have been passed in all the three cases on 27th February 2004. The orders have been executed on 4th March 2004. The orders of detention are based on the same incidents. The orders of detention are based on C.R.No.145 of 2003 registered against the Petitioners on 11th June 2003 with Mulund Police Station for offences punishable under Sections 399 and 402 of Indian Penal Code read with Sections 3 and 25 of the Arms Act. The Petitioners were arrested on 11th June 2003 in connection with the said C.R.

The order of detention is also based on C.R.No.51/2003 registered with the Aarey Sub-Police Station against all the three Petitioners for the offence punishable under Section 392, 394, 397 read with Section 34 of Indian Penal Code read with Sections 3 and 25 of Arms Act. The orders of detention also rely upon the C.R.No.34/2003 registered against the Petitioners with Sion Police Station for offences punishable under Sections 392, 395 read with Section 34 of Indian Penal Code read with Sections 3,4 and 25 of Arms Act. The orders of detention are also based on In-camera statements of witness 'A' and witness 'B'. The orders of detention record awareness of the detaining authority that the Petitioners were under arrest. The orders also recite that the Petitioners may be granted bail in due course.

3. The Petitioners have challenged the order of detention on various grounds. The main grounds canvassed by Shri Sejpal, the learned Counsel for the Petitioners are the ground Nos.(xi) (xii) and (xxvi). Shri Sejpal pointed out that Mulund Police Station in connection with C.R.No.145/2003 applied for approval for applying of The Maharashtra Control of Organised Crime Act, 1999 (hereinafter referred to as the MCOC Act) and on 9th December 2003 prior approval was granted by Additional Commissioner of Police (East Region). He submitted that the order granting prior approval was a vital document which ought to have been placed before the detaining authority along with other documents. He urged that the said

document could have affected the subjective satisfaction of the detaining authority. He submitted that the copies of the said vital document were also not supplied to any of the Petitioners. Shri Sejpal pointed out that the orders of detention were served on the Petitioners on 4th March 2004 and on 5th March 2004, the Petitioners were produced before the Special Judge under MCOC Act, when the concerned Investigating Officer filed an application for remand before the Special Court. He has placed on record copies of the application for remand made by the Investigating Officer i.e. Assistant commissioner of Police, Bhandup Division, Mumbai and the order dated 5th March 2004 passed by the learned Special Judge on the said Application. He relied upon the said order to which we have made a detailed reference at a later stage. Relying upon the various provisions of MCOC Act and in particular Section 21 he submitted that conditions for grant of bail under the said Act are very stringent. Relying upon Judgments of this Hon'ble Court he submitted that grant of bail under the said Act is virtually impossible. He, therefore, submitted that once the provisions of MCOC Act are applied to the Petitioners, their release on bail was impossible and therefore, before a subjective satisfaction was recorded by the detaining authority regarding likelihood of the Petitioners of being granted bail, the order granting approval on 9th December 2003 ought to have been placed before the detaining authority. He submitted that failure to place the said order of approval before the detaining authority has

vitiated subjective satisfaction of the detaining authority. He relied upon the Judgment of the Division Bench of this Court reported in 2003 ALL MR (Cri.) page No.1006 (Kishore Ramanna Pujari Vs. The Commissioner of Police Greater Mumbai & others), 2002 ALL MR (Cri.) page No.550 (Rajesh Bishamkumar Khanna @ Sagar Vs. Commissioner of Police and others). The learned Counsel relied upon the Judgment of Apex Court reported in A.I.R. 1999 S.C. page No.3897 (Ahamed Nassar v.State of Tamil Nadu and others), 1990 S.C.C. (Cri.) page No.249 (Dharmendra Suganchand Chelawat through his sister Vs. Union of India and others), 1979 S.C.C.(Cri.) page No.262 (Ashadevi wife of Gopal Ghermal Mehta Vs. K. Shivraji, Additional Chief Secretary to the Govt. of Gujarat and another), 1987 S.C.C. (Cri.) page No.311 (Union of India and others Vs. Manoharlal Narang) and 1989 S.C.C.(Cri.) page No.153 (Ayya @ Ayub vs. State of U.P. and another).

4. Shri Mhaispurkar learned A.P.P. submitted that the order granting approval under Section 23(1)(a) of MCOC Act was not at all a vital document. He submitted that by order dated 5th March 2004 the learned Special Judge under MCOC Act refused to take cognizance of the case against the Petitioners. He submitted that as the Special Court under MCOC Act took no cognizance of the case against the Petitioners, the order granting approval was not a relevant and material document. He submitted that the order of approval under Section 23 (1)(a) of MCOC Act was of no consequence. He submitted that a

sanction was not granted under Section 23(2) of MCOC Act and therefore, there was no occasion to take cognizance of the case against the Petitioners by MCOC Court. He submitted that unless and until sanction under Section 23(2) of MCOC Act is granted and unless Special Court takes cognizance of the case, the stringent rule for granting bail incorporated in Section 21 of the said Act will not apply to the Petitioners. He submitted that after considering the material placed before the detaining authority, the subjective satisfaction has been recorded that the Petitioners are likely to be released on bail as per the normal law of land.

5. We have carefully considered the rival submissions. It is to be borne in mind that whether a particular document is a vital document or not is an issue which depends on the facts of each case. The Apex Court in the case of Noor Salman Makani vs.Union of India and others reported in 1994 Cri.L.J. page No.602 held that

. **"...Whether a particular document is vital or not again is an issue which depends on the facts in each case.** The detention order itself was passed when the detenu was in jail and the detaining authority noted this fact and being satisfied that there was every possibility of his being released on bail, passed the detention order. If subsequently the detenu is released on bail even subject to certain conditions that does not bring about any material change. On the other hand, release on bail is a stronger ground showing that the detenu who is not in custody is likely to indulge in the

prejudicial activities again.."

(Emphasis supplied)

6. The requirement of law is that when a detenu is already in jail, the detaining authority must show awareness of the said fact. The detaining authority must also record satisfaction that the detenu was likely to be released from custody in near future and looking to the tendencies of the detenu after he is enlarged from the custody, he is likely to revert to the prejudicial activities.

7. It will be necessary to refer to the Affidavits-in-reply filed by the Respondents. The detaining authority has filed more than one Affidavits-in-reply. In the first Affidavit dated 13th September 2004 in paragraph No.18, the detaining authority has stated that till the issuance of order of detention and the execution of the same upon the detenues they were not arrested under MCOC Act and therefore, even if the Sponsoring Authority had moved for necessary permission for applying the provisions of MCOC Act, that would not have affected the subjective satisfaction of the detaining authority. In paragraph No.20 of the Affidavit, the detaining authority has stated that the Sponsoring Authority had not informed the detaining authority about the proposal for application of MCOC Act.

8. One Sudam Anand Chavan, Police Sub Inspector has filed Affidavit-in-reply on behalf of the Sponsoring Authority. In

the paragraph No.6 of his Affidavit, he has stated that,

. "...It is submitted that after the detenue and his associates were arrested and it was realised that they have indulged in other offences. It is submitted that thereafter the crime meeting was held on 23-6-2003 which was also attended by the Commissioner of Police and other higher Officers and it was decided that the provisions of MCOC Act should be applied to the organised crime syndicate of the detenu and his associates. It is submitted that in view of these circumstances, the sanction obtained by the Sponsoring Authority from the Additional Commissioner of Police, East Region, which was applied on 4-12-2003 and received on 9-12-2003 i.e. after the proposal for the detention of the detenu was submitted to the Detaining Authority. It is submitted that as per normal practise every order of sanction for prosecution under MCOC Act is sent to the Additional Commissioner of Police and from their the Commissioner of Police is informed about the same. In these circumstances, the Sponsoring Authority did not forward information of receipt of the sanction to invoke the provisions of MCOC Act to the detenu and his associate to the Detaining Authority. It is submitted that till the issuance of Detention Order and in execution, the Special Court, constituted under MCOC Act had not taken cognizance and the detenu and his associates were not arrested under the MCOC Act, therefore, for want of forwarding those documents to Detaining Authority to the detenu cannot be said to have violated any rights of the detenu or affected the subjective satisfaction of the Detaining Authority. Authority gets vitiated. I state that since the detenu was not arrested and under the MCOC Act prior to issuance and at the time of execution of detention order, the said facts were not vital and relevant which would have affected satisfaction of the Detaining Authority one way or the other."

In the Second Affidavit of Detaining Authority dated 11th October 2004 it is stated that Sponsoring Authority did not inform the Detaining Authority that after forwarding the proposal for detention under the said Act of 1981, in C.R.No.145/2003, the Sponsoring Authority has moved the proposal and obtained the sanction to prosecute the Petitioners under MCOC Act on 9th December 2003. The Detaining Authority thus came out with a case that a sanction under the MCOC Act was granted on 9th December 2003. In the said Affidavit the Detaining Authority stated that even for offences committed under MCOC Act, several accused have been granted bail by the Special Court or by the Hon'ble High court and as such there is no absolute bar for releasing a person on bail.

9. On 15th October 2004 one more Affidavit-in-reply has been filed by the Detaining Authority. In the said Affidavit the Detaining Authority clarified that by order dated 9th December 2003 only prior approval has been granted by the Additional Commissioner of Police, East Region, Mumbai for applying the provisions of MCOC Act and the order granting prior approval became inconsequential in view of the fact that the Special Court having not taken cognizance of the offence under MCOC Act based on the said order granting prior approval and therefore the said order granting approval cannot be said to be a vital document.

10. At this stage, it will be necessary to refer to a copy of Remand Application No.2 of 2004 filed by the Assistant Commissioner of Police, Bhandup Division, Mumbai on 5th March 2004 before the Special Court under the MCOC Act. In the said Application, details of the offences allegedly committed by the Petitioners have been set out. It is stated in the Application that necessary permission under the provisions of MCOC Act has been obtained from the Additional Commissioner of Police, East Region, Mumbai vide order dated 9th December 2003 and accordingly Sections 3(1) (ii), 3(2), 3(4) and 4 have been applied to the case on 27th February 2004. It is stated in the Application that the Special Court was pleased to issue production warrant against the accused Nos.1 to 4 and ordered them to produce before the Special Court on 5th March 2004. The Petitioners in this group of Writ Petitions are accused Nos.4,1 and 2 respectively. The application also notes that non-bailable arrest warrant were issued by the Special Court against the accused Nos.5 and 6 on 1st March 2004. By the said application police custody of all the accused was prayed for. We have also perused the copy of order dated 5th March 2004 passed by the Special Court on the said Remand Application. The Special Court referred to prior approval under Section 23(1) (a) of MCOC Act dated 9th December 2003. The Special Court in paragraph No.5 of the Order recorded that the Investigating Officer himself expressed a doubt about the applicability of MCOC Act in this case. The Special Court

observed that granting belated police custody remand in a case which is ripe for hearing as Sessions Case pending in the Sessions Court was neither proper nor just. The Special Court therefore rejected the application for police custody and observed that Investigating Officer can always obtain prior approval from Superintendent of Jail for interrogating the accused. By the said order, the Special Court granted bail to accused Nos.5 and 6. On plain reading of the order it is very clear to us that the learned Special Judge has not passed an order declining to take cognizance of the case. The effect of the order is that he has rejected the application for remand. Perusal of the application for remand and order passed by the learned Special Judge, it is clear that an order of production warrant was obtained prior to 4th March 2004 from the Special Court under MCOC Act as it is not in dispute that the production warrant was served in the jail on 4th March 2004. The precise date on which the production warrant was obtained is not on record of these petitions.

11. From the order of the Special Court it appears to us that on 9th December 2003 the approval has been granted under Section 23(1) (a) of MCOC Act by the Additional Commissioner of Police, East Region, Mumbai. We are constrained to observe that the stand taken by the detaining authority in its various Affidavits is inconsistent. In the first Affidavit-in-reply filed by the detaining Authority all that is stated in paragraph No.18 is that the Sponsoring Authority had moved the

proposal for application of MCOC Act on 9th December 2003. In the said Affidavit there is no reference to approval being granted on 9th December 2003. In the paragraph No.20 of the said Affidavit it is stated that "...it is submitted that the Sponsoring Authority had not informed the detaining Authority about the proposal for MCOC Act having moved by them against the detenu and his associate." Thus, the first Affidavit of the detaining Authority does not show awareness of grant of approval on 9th December 2003.

12. In the Affidavit-in-reply of the Sponsoring Authority it is stated that the Sponsoring Authority obtained sanction from the Additional Commissioner of Police, (East Region, Mumbai) which was applied on 4th December 2003 and received on 9th December 2003. Therefore, the Sponsoring Authority has referred to the sanction under MCOC Act and not mere approval under Section 23(1) (a). In the second Affidavit filed by the detaining Authority in paragraph No.2 it is stated that the Sponsoring Authority obtained sanction to prosecute the detenu and his associate invoking the provisions of MCOC Act on 9th December 2003. In the last Affidavit of the detaining Authority it is stated that the Additional Commissioner of Police has not granted sanction under Section 23(2) but only a prior approval has been granted under Section 23(1) (a) of the said Act.

13. It is therefore necessary to consider the provisions of

Section 23 of MCOC Act which read thus:

> 23. Cognizance of, and investigation into, an offence -
>
> (1) Notwithstanding anything contained in the Code- (a) no information about the commission of an offence of organised crime under this Act, shall be recorded by a police officer without the prior approval of the police office not below the rank of the Deputy Inspector General of Police.
>
> (b) no investigation of an offence under the provisions of this Act shall be carried out by a police officer below the rank of the Deputy Superintendent of Police.
>
> (2) No Special Court shall take cognizance of any offence under this Act without the previous sanction of the police officer not below the rank of Additional Director General of Police.

On plain reading of Sub Section 1 (a) of Section 23 it appears that prior approval is required to be granted for recording information about the commission of an offence under MCOC Act. Sub Section 2 of Section 23 provides that no Special Court shall take cognizance of any offence under the Act without previous sanction. Therefore, the approval as contemplated under Sections 23(1) and sanction under Section 23(2) are totally different and they operate at different stages. The first Affidavit of the detaining authority merely states that the Sponsoring Authority had moved the proposal for application of MCOC Act on 9th December 2003. The said Affidavit does not show awareness whether any approval or sanction was granted. It is specifically stated therein that

the detaining authority was not made aware about the application moved for applying MCOC Act.

14. The Sponsoring Authority has clearly referred to the sanction being granted under MCOC Act. Moreover, the Sponsoring Authority has stated that as per normal practice every order of sanction for prosecution under MCOC Act is sent to the Additional Commissioner of Police and from the office of Additional Commissioner of Police, the Commissioner of Police is informed about the same. There are two explanations given by the Sponsoring Authority for not placing the sanction/approval before the detaining authority. Firstly because in presence of the Commissioner of Police who is the detaining authority a meeting was held on 23rd June 2003 in which a decision was taken to apply MCOC Act to the Petitioners and secondly, in normal course the order of sanction is forwarded by the Additional Commissioner of Police to the Commissioner of Police who is detaining authority. Thus, the Sponsoring Authority has not specifically disputed the requirement of making the detaining authority aware about the order of sanction.

15. As stated earlier, in the second Affidavit of the detaining Authority, without explaining the assertions made in the first Affidavit and in particular in paragraph Nos.18 and 20 thereof, a case has been made out that the sanction to prosecute the Petitioners under MCOC Act has been obtained on

9th December 2003. The said Affidavit does not show that the detaining authority was aware that what has been granted is an approval under Section 23(1) (a) of MCOC Act and the detaining authority in the said Affidavit has proceeded on erroneous assumption that a sanction has been granted. The detaining Authority has not stated in the second Affidavait that he was made aware about the sanction/approval granted on 9th December 2003 before he passed the order of detention. Only in the last Affidavit the detaining Authority came out with the correct factual position that what has been granted is a prior approval under Section 23 (1) (a) of MCOC Act. We must record our disapproval about the different and inconsistent stand taken by the detaining authority and Sponsoring Authority in the various Affidavits-in-reply. The Detaining Authority seems to have taken inconsistent stands on this aspect in the three Affidavits-in-reply. It is surprising that though in the Memorandum of Petition in ground No.(xii) refers to the approval, the detaining Authority has shown lack of awareness of the grant of approval while filing the first Affidavit. The detaining authority has shown awareness of only the fact that the application for approval was moved on 9th December 2003 which is again factually incorrect as is revealed from the Affidavit of the Sponsoring Authority which shows that the Application was moved on 4th December 2003. In the second Affidavit-in-reply a reference has been made to a grant of sanction which was never really granted. In the third Affidavit-in-reply it is clarified that there was no sanction

granted and what was granted was an approval under Section 23(1)(a).

16. The only question to be decided is whether the order granting the approval was a vital document. As held by the Apex Court in the case of Noor Salman Makani's case, whether a particular document is vital or not is an issue which depends on the facts of each case. The stand has been taken before us in the Affidavits that the order granting approval was not acted upon. If the the order granting approval was not really acted upon, perhaps, there was some substance in the contention raised by the Respondents that the order of approval was not a vital document. In the application for remand filed on 5th March 2004 before the Special Court it is stated that Sections 3(1) (2), Section 3(2), 3(4) and 4 of MCOC Act have been applied on 27th February 2004 to the Petitioners on the basis of approval. The Special Court issued production warrants against the accused Nos.1 to 4 and ordered them to be produced before it on 5th March 2004. Thus, the stand taken in the said application is that the provisions of the Act were applied on the date on which the order of detention was passed and a production warrant was obtained from the Special Court on the basis of order of approval dated 9th December 2003. The order passed by the Special Court also records that the custody of the Petitioners was taken on the morning of 5th March 2004 from Thane Jail. In the present case, only defence of the detaining authority

is that the order granting approval was not acted upon. In the facts of these cases it is very clear that on the very date on which the detention order was passed certain sections of MCOC Act were applied. It is reflected from the Remand Application made by the Assistant Commissioner of Police that before order of detention was executed an order for issuance of production warrants was passed by the Special Court. Moreover, in the order dated 5th March 2004 there is no clear refusal recorded by the Special Court to take cognizance under MCOC Act. Even in the Affidavit of the Sponsoring Authority a case is made out is that in normal course the order of approval is communicated by the Additional Commissioner of Police to the Commissioner of Police and therefore, the order was not specially brought to the notice of the Commissioner of Police by the Sponsoring Authority. Considering the fact that the order granting approval was acted upon on the date on which the order of detention was passed and further step of taking the production warrants from the Special Court under MCOC Act was taken before the execution of the order of detention, we are satisfied that the order granting approval under Section 23(1)(a) of the MCOC Act, in the facts of the case, was a vital document. Considering the peculiar facts of the present case, we are of the view that the said order could have influenced the subjective satisfaction of the detaining authority. In view of this position, the detention order passed against the Petitioners deserves to be quashed and set aside.

17. Hence we pass following order :

i) Rule issued in Criminal Writ Petition No.1184 of 2004 is made absolute and the Petitioner Ganesh Navalsingh Thapa is directed to be released forthwith unless he is required in connection with some other case.

ii) Rule issued in Criminal Writ Petition No.1185 of 2004 is made absolute and the Petitioner Ashok Narayan Jiwani is directed to be released forthwith unless he is required in connection with some other case.

iii) Rule issued in Criminal Writ Petition No.1186 of 2004 is made absolute and the Petitioner Ashokkumar Thewar @ Kittu @ Hussein is directed to be released forthwith unless he is required in connection with some other case.

iv) We direct the Registrar-Judicial to forward a copy of this Judgement to the Commissioner of Police, Mumbai to enable him to ensure that such glaring mistakes are not committed in future.

v) Certified copy is expedited.

(SMT.RANJANA DESAI,J.)

(ABHAY S. OKA,J.)